In the Matter of the Compensation of
JULIANE M. NICHOLS, Claimant
WCB Case No. 23-00001TP
THIRD PARTY DISTRIBUTION ORDER
Julene M Quinn LLC, Claimant Attorneys
Sather Byerly Holloway - SBH Legal, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

Sedgwick Claim Management Services (Sedgwick) has petitioned the Board for resolution of a dispute concerning a "third-party settlement/recovery" matter. *See* ORS 656.580(2); ORS 656.587; ORS 656.593(3). Specifically, this matter concerns whether Sedgwick is a "paying agency" pursuant to ORS 656.576, which would entitle it to a share of the settlement proceeds, as well as the resolution of a dispute regarding the "just and proper" distribution of proceeds from a $25,000 third-party settlement. *See* ORS 656.587; ORS 656.593(3). Based on the following reasoning, we conclude that Sedgwick's lien is statutorily authorized, that a distribution in accordance with ORS 656.593(1) is "just and proper," and that Sedgwick is entitled to recover $11,111.11 as its "just and proper" share of the third-party settlement.

FINDINGS OF FACT

On March 8, 2021, claimant filed a workers' compensation claim. (Ex. 1). She asserted that she had been injured during a January 15, 2021, motor vehicle accident in which she was rear-ended by another driver while working for her employer. (*Id*.)

On March 11, 2021, Sedgwick accepted a nondisabling neck strain. (Ex. 2).

On May 12, 2021, claimant requested that Sedgwick also accept "cervical disc disorder at C5-6 level with radiculopathy; C5-6 disc bulge/protrusion/herniation/condition; and C6-7 disc bulge/protrusion/herniation/condition" as new or omitted medical conditions. (Ex. 3). Sedgwick denied the new or omitted medical condition claim on July 9, 2021. (*Id*.) Claimant requested a hearing challenging Sedgwick's denial.

On May 25, 2021, Sedgwick issued a Refusal to Reclassify the claim. (Ex. 4-1). On July 12, 2021, the Appellate Review Unit (ARU), on behalf of the Director, began a review of the refusal. (*Id*.) On September 10, 2021, the ARU issued a Classification Review and Order affirming Sedgwick's refusal to

reclassify the claim as disabling. (Ex. 4-4). In doing so, the ARU found no reasonable expectation of permanent partial disability resulting from the accepted neck strain or direct medical sequela, and that no temporary partial disability was due and payable. (*Id*.)

On October 20, 2022, Sedgwick denied "compensability of [claimant's] current condition, disability, and need for treatment." (Ex. 6). The denial further provided:

> "Medical evidence indicates the accepted neck strain and any compensable conditions stemming from the January 15, 2021 work injury or your general work activities at Providence are no longer, and have ceased to be, the major contributing cause of your current condition, disability, and need for treatment including the C5-7 fusion to treat the cervical spondylosis and cervical cord compressions. It is our position legally cognizable preexisting conditions, however diagnosed, have overcome the accepted neck strain and any compensable conditions stemming from the January 15, 2021 work injury as the major contributing cause of your current condition, disability, and need for treatment.
>
> "This is a current condition denial. The denial is not based on an independent medical examination. We are issuing this denial in connection with a settlement of your claim. We reserve the right to rescind this denial without exposure to penalties or fees if you back out of settlement."

(*Id*.)

On that same date, claimant appealed Sedgwick's denial. (Ex. 7). On November 21, 2022, claimant withdrew her request for hearing concerning that denial (WCB Case Nos. 22-04705 and 22-04664). (Ex. 8). An Administrative Law Judge (ALJ) dismissed WCB Case Nos. 22-04705 and 22-04664 on December 2, 2022. (Ex. 9).

On that same date, the ALJ approved a Claims Disposition Agreement (CDA) submitted by the parties in the amount of $60,000.[1] (Ex. 9a). Consistent with ORS 656.236, the agreement noted that claimant retained medical service-

[1] The CDA version submitted by Sedgwick for inclusion in the record was not approved by an ALJ who mediated the case or by the Workers' Compensation Board. The carrier is reminded that all relevant and final records should be submitted in the future. *See Blackman v. SAIF*, 60 Or App 446, 448

related benefits for her compensable injury. (Ex. 9a-3-4). Moreover, the CDA stated that "[t]he employer/administrator retains its lien rights pursuant to ORS 656.576 et seq. The parties stipulate and agree that Sedgwick will limit its third-party recovery lien to a maximum of $20,000." (Ex. 9a-4). In addition, the CDA provided that, on approval of the agreement, the requests for hearing regarding WCB Case Nos. 21-03704 and 21-04149 shall be dismissed. (Ex. 9a-5). The parties agreed to waive the "cooling off" period. (Ex. 9a-6).

Sedgwick submitted a print screen of payments made to various medical providers from the date of injury through March 2, 2022. (Ex. 10). The total amount of medical bills paid was $7,802.29. (Ex. 10-4).

A letter to claimant's counsel from the third-party liability carrier dated December 19, 2022, noted a settlement offer in the amount of $25,000 for the policy limit. (Ex. 11-2). The letter requested that claimant's counsel discuss the offer with claimant and respond. (*Id*.)

On December 30, 2022, claimant's counsel notified Sedgwick that the third-party liability carrier had tendered the insured's $25,000 policy limit. (Ex. 11-1). Claimant's counsel requested written confirmation that Sedgwick approved claimant's acceptance of the liability limits. (*Id*.)

CONCLUSIONS OF LAW AND OPINION

Claimant asserts that the third-party lien asserted by Sedgwick is null and void. In particular, she argues that, as a result of Sedgwick's October 20, 2022, denial, Sedgwick lacks statutory authority to assert a lien pursuant to ORS 656.580(2).[2] In doing so, claimant asserts that Sedgwick does not qualify as a "paying agency."

In response, Sedgwick contends that it qualifies as a "paying agency" and is entitled to a share in the third-party settlement. Specifically, it asserts that a CDA expressly preserved its lien rights and that its October 20, 2022, denial did not extinguish the initial compensability of a claim that was, and remains, accepted and for which benefits were paid.

(1982) (a third-party distribution order must be based on a record sufficient to sustain judicial review under ORS 656.298). Under these particular circumstances, we have taken administrative notice of the approved and final CDA, and included it in the record as Exhibit 9a.

[2] ORS 656.580(2) provides that "[t]he paying agency has a lien against the cause of action as provided by ORS 656.591 or 656.593."

Pursuant to the CDA, all third-party liens were preserved up to $20,000. Nonetheless, the question we are asked to resolve is, in light of Sedgwick's October 20, 2022, denial that issued before the third-party settlement, whether it qualified as a "paying agency" at the time of the third-party settlement such that it is statutorily authorized to a share of claimant's settlement. Based on the following reasoning, we conclude that Sedgwick is a "paying agency" and that the disputed lien is statutorily authorized.

Pursuant to ORS 656.578, if a worker "receives a *compensable injury* due to the negligence or wrong of a third person," the worker "shall elect whether to recover damages from such * * * third person." (Emphasis added.) The proceeds of any damages recovered from a third person by the worker shall be subject to a lien of the "paying agency" for its share of the proceeds. ORS 656.593(1). A worker may settle a third-party action pursuant to ORS 656.578 with approval of the "paying agency" and the "paying agency" is entitled to a share in the distribution of the settlement. ORS 656.587; ORS 656.593(3).

"Paying agency" means the self-insured employer or insurer "paying benefits" to the worker or beneficiaries at the time of the third-party settlement. ORS 656.576; *Sedgwick CMS, Inc. v. Dover*, 318 Or App 38, 48 (2022); *SAIF v. Wright*, 113 Or App 267, 271-72 (1992). "Paying benefits" does not require that the self-insured employer or insurer literally be making payments to the worker at the time of settlement; rather, the employer/insurer must be *responsible* for paying benefits to the worker on a compensable claim. *Dover*, 318 Or App at 48-49.

The underlying public policy of the third-party distribution statutes and the purpose of the statutory liens is to allocate whatever the claimant recovers from a third party between her and the paying agency and to provide reimbursement to those responsible for statutory compensation of injured workers when damages for settlements are obtained against the persons whose act caused the injuries. *Allen v. American Hardwoods*, 102 Or App 562, 567, *rev den*, 310 Or 547 (1990); *Schlecht v. SAIF*, 60 Or App 449, 456 (1982); *Sarah J. Ramirez*, 74 Van Natta 123, 126 (2022).

Here, claimant contends that *Dover* requires a finding that Sedgwick is not a paying agency. However, the facts in *Dover* are distinguishable.

In *Dover*, the processing agent for a noncomplying employer accepted the claim and began paying the claimant benefits. 318 Or App at 41. Pursuant to ORS 656.054(1), the noncomplying employer challenged the determination of

noncompliance, the compensability of the claim, and the processing agent's acceptance. *Id*. Ultimately, the claimant, the employer, the processing agent, and the Workers' Compensation Division (Division) reached a disputed claim settlement (DCS) agreement. *Id*. By the terms of the DCS, the Division's determination that the employer was noncomplying was upheld. *Id*. The agreement further provided that the employer's denial of the claim would be upheld and that the processing agent's acceptance of the claim would be set aside. *Id*. The DCS stated that the Division and the processing agent remained entitled to all liens resulting from the payment of benefits to the claimant. *Id*. at 42. The DCS resolved that "nothing in this document affects or impairs any rights or remedies of the [Division], [the processing agent], or the employer, specifically those arising under ORS 656.576 to 656.595, except as expressly stated in this agreement." *Id*. An ALJ approved the DCS and it became final. *Id*.

Over a year later, the claimant sought to settle a separate civil action for her injuries that she had brought against a third-party tortfeasor. *Id*. She filed a petition for a third-party order determining that, despite the DCS's reservation of "statutory rights," the processing agent had no statutory right to share in the settlement proceeds. *Id*. The processing agent responded that, as an assigned claims agent that had accepted the claim and paid benefits, it was entitled to enforce a lien on the settlement proceeds for benefits paid to the claimant in processing the claim. *Id*. The claimant objected, asserting that the processing agent was not a paying agency, as the term is defined in ORS 656.576. *Id*.

Addressing the definition of "paying agency" under ORS 656.576, the court noted that the statutory definition implicitly contemplated a compensable claim. *Id*. at 48. Moreover, the court concluded that the definition required that the self-insured employer or insurer be paying benefits to the worker or beneficiaries, which it interpreted to mean that the insurer must be responsible for paying benefits at the time of the third-party settlement. *Id*. at 48-49.

Under the particular facts in *Dover*, the court concluded that the processing agent was not a "paying agency" under ORS 656.576 at the time of the settlement. *Id*. at 50. In reaching this conclusion, the court explained that the processing agent would have been a paying agency had the claim not been denied and the processing agent remained responsible for paying benefits. *Id*. However, the court reasoned that when the processing agent denied the claim through the DCS, it was freed from its responsibility to pay benefits under the Act and had also lost its rights under the third-party law to seek reimbursement from a third-party settlement as a paying agency. *Id*. Finally, it noted that the reservation of rights

that the parties included in the DCS was essentially ineffectual because an insurer that has denied a claim at the time of settlement is not a paying agency and does not have any statutory right to share in the settlement proceeds. *Id*.

Here, unlike the claim in *Dover*, in which the DCS finally determined that the claim was not compensable *ab initio* when it affirmed the noncomplying employer's challenge to the processing agent's claim acceptance, the present claim was ultimately determined to be a compensable injury. Specifically, Sedgwick's claim acceptance was unchallenged and, thus, Sedgwick was responsible for paying benefits on the compensable claim.[3] *Compare Dover*, 318 Or App at 48 (addressing the definition of "paying agency" under ORS 656.576, the court noted that the statutory definition implicitly contemplated a compensable claim).

In addition, the parties herein did not enter into a DCS. Rather, the parties entered into a CDA. Pursuant to ORS 656.236(1) (which governs CDAs), parties may dispose of any and all matters potentially arising out of an accepted claim, with the exception of medical service-related benefits, subject to such terms and conditions as the Board may prescribe.

In this case, consistent with ORS 656.236(1)(a), the approved CDA expressly provided that claimant retained medical service-related benefits. Under such circumstances, unlike the DCS agreement in *Dover*, when claimant reached a third-party resolution with the tortfeasor, the CDA ensured that the carrier remained responsible for those particular benefits, even after a settlement was reached.

[3] We further note that Sedgwick's payment of benefits regarding an accepted claim generally constitutes "compensation." *See* ORS 656.005(8). Unlike the situation in *Dover* where the noncomplying employer had an express statutory right to contest the processing agent's claim acceptance under ORS 656.054(1) and, therefore, the processing agent's payment of such benefits was essentially contingent in nature, here, the claim remained accepted. Consequently, in this particular context, Sedgwick's previous payment of benefits for the accepted claim satisfies the statutory definition of "compensation"; *i.e.*, all benefits, including medical services, provided for a *compensable injury*. *See* ORS 656.005(8); *see also* ORS 656.578(1) ("If a worker * * * receives a *compensable injury* due to the negligence or wrong of a third person * * * such worker * * * shall elect whether to recover damages from such employer or third person * * *." (Emphasis added.)); ORS 656.580(2) ("The paying agency has a lien against the cause of action as provided by ORS 656.591 or 656.593 * * *."); ORS 656.593(1)(c) ("The paying agency must be paid and retain the balance of the recovery, but only to the extent that the paying agency is compensated for the paying agency's expenditures for *compensation* * * *." (Emphasis added.))

The remaining question is what impact the carrier's "current condition" denial had on Sedgwick's responsibility for paying benefits on a compensable claim. The terms of the "current condition" denial, although broad, do not encompass the initial compensability of the claim for which benefits were paid, unlike the DCS in *Dover*. Rather, it purports to resolve the condition, need for treatment, and disability as they "currently" existed on the date of the denial. Furthermore, claimant can initiate a new or omitted medical condition claim, or assert the compensability of the medical services-related benefits that were preserved by the CDA, at any time. *See* ORS 656.267(1); ORS 656.236(1); ORS 656.245(1). In other words, the "neck strain" claim remains compensable and Sedgwick remains responsible for processing the claim and paying benefits.

Therefore, under these particular circumstances, Sedgwick remained responsible for paying benefits at the time of the third-party settlement on the compensable claim, even though it was not paying benefits at that time. Thus, Sedgwick is a "paying agency." *See* ORS 656.576. Consequently, claimant's settlement is subject to the "third-party settlement/recovery" statutes. Accordingly, we analyze the "just and proper" distribution of the third-party settlement.

If a worker is compensably injured due to the negligence or wrong of a third party not in the same employ, the worker shall elect whether to recover damages from the third party. ORS 656.578. The proceeds of any damages recovered from the third party by the worker shall be subject to a lien of the paying agency for its share of the proceeds. ORS 656.593(1). Here, for the reasons expressed above, Sedgwick is a "paying agency." ORS 656.576.

Because claimant settled her third-party claim and the paying agency approved that settlement, the paying agency is authorized to accept as its share of the proceeds "an amount which is just and proper" provided that claimant receives at least the amount to which she is entitled under ORS 656.593(1) and (2). ORS 656.593(3); *Estate of Troy Vance v. Williams*, 84 Or App 616, 619-20 (1987). The amounts referred to in ORS 656.593(1) and (2) pertain to attorney fees, litigation expenses, and claimant's statutory one-third share of the settlement. Any conflict concerning a "just and proper" distribution shall be resolved by the Board. ORS 656.593(3). Because such a conflict exists in this case, we now proceed with a determination of a "just and proper" distribution.

The parties do not dispute that a "just and proper" distribution of the settlement proceeds should follow the statutory formula in ORS 656.593(1). *See Urness v. Liberty Northwest Ins. Corp*., 130 Or App 454 (1994) (because "ad hoc"

distributions are contemplated by ORS 656.593(3), it is improper for the Board to automatically apply the distribution scheme for third-party judgments under ORS 656.593(1) when resolving disputes regarding third-party settlements; however, a distribution that mirrors the third-party judgment scheme may, in fact, be "just and proper" provided that such a determination is based on the merits of the case); *Steven M. Anderko*, 50 Van Natta 2011 (1998) (in accordance with *Urness*, when exercising our statutory authority under ORS 656.593(3), we do not arbitrarily adhere to the specific distribution scheme set forth in ORS 656.593(1)). For the following reasons, we find that it is "just and proper" for the paying agency to receive $11,111.11 from the third-party settlement as partial reimbursement for its claim costs.

We begin by noting that claimant's counsel does not contest Sedgwick's proposed distribution of the third-party settlement, but rather asserts that it is not entitled to a third-party lien. Having resolved that issue, we agree with Sedgwick's proposed distribution, which is consistent with ORS 656.593(1) and (3).

Sedgwick is entitled to receive its "just and proper" share of the settlement based on its actual and reasonably to be expected claim costs.[4] After distribution of attorney fees and costs[5] ($8,333.33) and claimant's statutory one-third share ($5,555.56), the remaining settlement balance is $11,111.11. *See* ORS 656.593(1).[6]

[4] Sedgwick did not assert a lien for future claim costs and, in any event, its actual claim costs exceed the remaining balance of settlement proceeds subject to this third-party lien.

[5] Claimant's counsel does not assert litigation costs.

[6] ORS 656.593(1) provides that the total proceeds shall be distributed as follows:

"(a) Costs and attorney fees incurred shall be paid, * * *.

(b) The worker * * * shall receive at least 33-1/3 percent of the balance of such recovery.

(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under this chapter. * * *.

(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker forthwith. * * *."

The record establishes that Sedgwick paid actual claim costs for medical benefits in the amount of $7,802.29 and entered into a CDA in the amount of $60,000. (Exs. 9a, 10). Claimant does not specifically dispute reimbursement for these expenditures. *See Turo v. SAIF*, 131 Or App 572 (1994) (CDA proceeds are compensation, which is generally reimbursable from a third-party settlement); *Rollie W. Shandy*, 48 Van Natta 1521, 1522 (1996) (same).

Under these circumstances, we conclude that it is "just and proper" for Sedgwick to receive the remainder of the third-party settlement after the attorney fee/costs and claimant's share. Accordingly, claimant's counsel is directed to forward to Sedgwick $11,111.11 as its share of the third-party settlement proceeds.[7] *See* ORS 656.593(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on July 12, 2023

[7] In accordance with OAR 438-015-0095, the settlement proceeds would be calculated as follows:

Gross Settlement:	$25,000
1/3 attorney fee/costs:	-$8,333.33
Sub-total:	$16,666.67
Claimant's 1/3 share:	-$5,555.56
Balance to Sedgwick	$11,111.11